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In the Supreme Court of the United States

OCTOBER TERM, 1971

MIKE GRAVEL, UNITED STATES SENATOR, PETITIONER

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, PETITIONER

v.

MIKE GRAVEL, UNITED STATES SENATOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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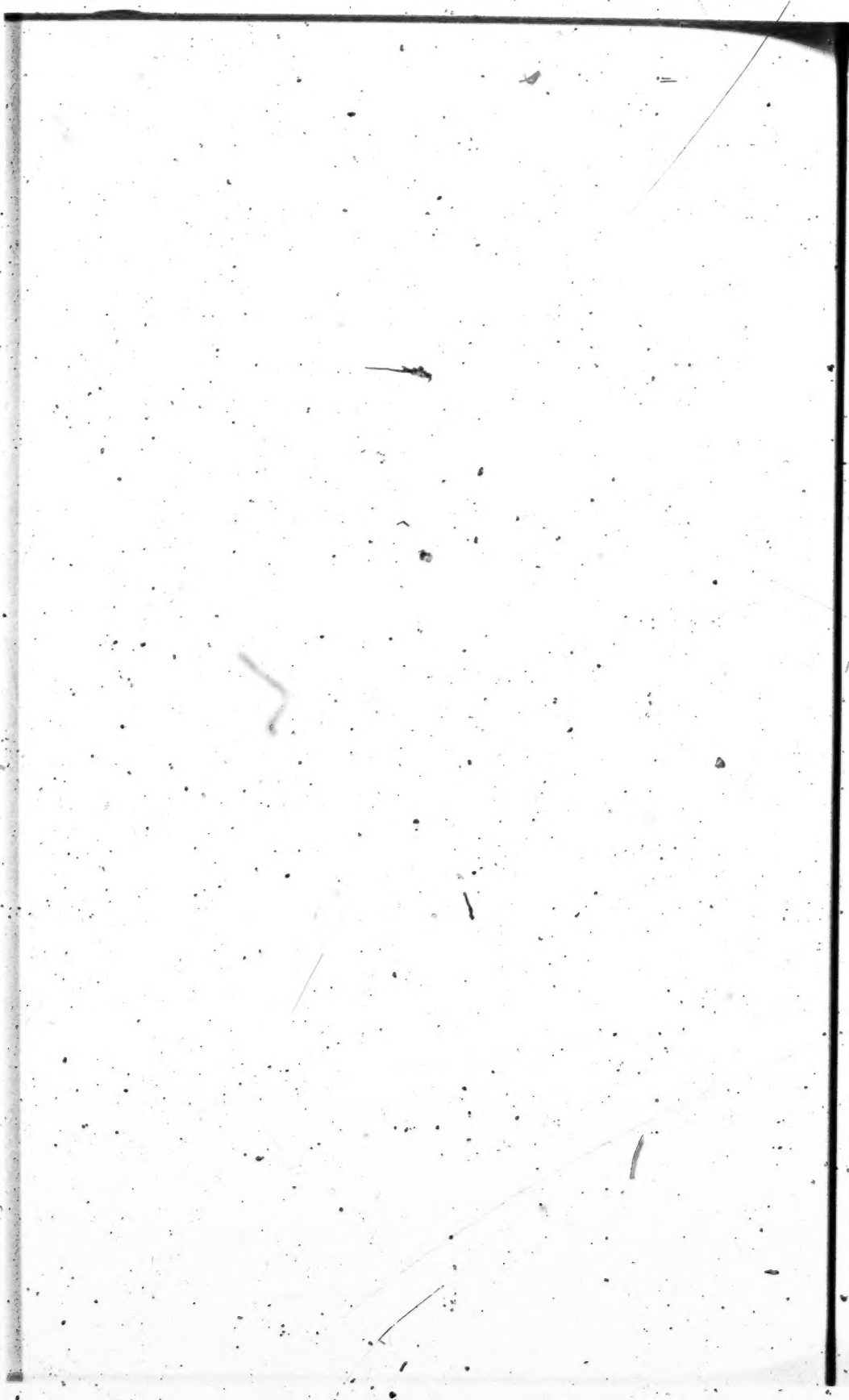
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OPINIONS BELOW

Neither the original opinion of the court of appeals (Appendix A, Pet. No. 71-1026)¹ nor its opinion on rehearing (Pet. App. B) is yet reported. The Memorandum of Decision and Protective Order of the district

¹ The references in this brief to "Pet. App." are to the petition in No. 71-1026.

court (Pet. App. D) is reported at 332 F. Supp. 930.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1972. The petition for a writ of certiorari in No. 71-1017 was filed on February 9, 1972, and the petition in No. 71-1026 was filed on February 10, 1972; both were granted on February 22, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause of the Constitution (Art. I, Sec. 6) bars a grand jury from questioning aides of members of Congress and other persons about matters that may touch on activities of a member that are protected "Speech or Debate."

2. Whether the Clause bars a grand jury from questioning Congressional aides and other persons about private republication of material that a Congressman had introduced into the record of a hearing before a Congressional committee.

3. Whether Congressional aides have a common law privilege to refuse to testify before a grand jury about such republication.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 6 of the United States Constitution provides:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of

the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

STATEMENT

Late in the evening of June 29, 1971, Senator Mike Gravel of Alaska convened a public hearing of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee and read aloud extensive portions of a classified study prepared by the Department of Defense, popularly called the Pentagon Papers,² which he had "unauthorizedly" (Pet. App. A, p. 18) obtained. At the close of the hearing, he placed the entire study, comprising some 7,000 pages of material in 47 volumes and bearing an overall defense security classification of TOP SECRET, SENSITIVE, in the public subcommittee record.

Earlier that day, Dr. Leonard S. Rodberg, a physicist and resident fellow at the Institute for Policy Studies in Washington, D.C., had been engaged as a staff member by Senator Gravel; he assisted the Senator in preparing for and conducting the subcommittee hearing. Thereafter, Dr. Rodberg assisted Senator Gravel in negotiating with several publishing firms for private republication of the study. An agreement

² The facts and procedural history of this case are set out in the opinion of the court of appeals (Pet. App. A, pp. 18-19) and the opinion of the district court (Pet. App. D, pp. 38-39, 41-43).

was ultimately concluded with Beacon Press, of Boston, to publish a four-volume work entitled "The Senator Gravel Edition of the Pentagon Papers: the Defense Department History of Decision Making on Vietnam"

On August 27, 1971, a federal grand jury sitting in Boston, Massachusetts,^{2a} subpoenaed Dr. Rodberg to appear as a witness. Dr. Rodberg moved to quash the subpoena, and Senator Gravel was allowed to intervene in support of the motion. Senator Gravel argued that Dr. Rodberg, as his legislative aide, was protected by the Speech or Debate Clause from any inquiry regarding the meeting of the subcommittee and efforts by Rodberg, on behalf of the Senator, to publish the study.

The district court denied the motions to quash. It ruled, however, that Senator Gravel's privilege under the Speech or Debate Clause limited the subjects about which the grand jury could question Dr. Rodberg. The court held that "the Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally" (Pet., App. D, p. 51). The court further ruled that the arrangement for private republication of the study by Beacon Press was not within the Senator's privilege and therefore that Dr.

^{2a} The grand jury was investigating the following possible crimes: the retention of public property or records with intent to convert (18 U.S.C. 641), the gathering and transmitting of national defense information (18 U.S.C. 793), the concealment or removal of public records or documents (18 U.S.C. 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. 371) (Pet. App. A, p. 19).

Rodberg could not refuse to testify before the grand jury concerning that matter. The court entered the following order (Pet. App. D at 52):

(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor about things done by the Senator in preparation for and intimately related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting.

While the district court proceedings were pending, a grand jury subpoena was served on Howard Webber, Editor of the Massachusetts Institute of Technology Press, with which ultimately unsuccessful negotiations for republication had been carried on. The district court issued a supplemental order staying both subpoenas. After notices of appeal had been filed, the court of appeals granted Senator Gravel's motion for a stay pending appeal and halted the grand jury's inquiry until further order.

Both sides appealed and the court of appeals affirmed the district court's order with modifications (Pet. App. A, pp. 31, 36-37).

The court of appeals rejected the government's argument that questioning before a grand jury about—as opposed to civil or criminal liability for—legislative conduct was not within the protection afforded to Speech or Debate.³ The court reasoned that, even when there is no danger of criminal prosecution or civil liability, a legislator might be intimidated and harassed by questioning and could be hindered in performing his legislative responsibilities (*id.*, pp. 22-23).

The court next ruled that under the Speech or Debate Clause a grand jury could not inquire into a Congressman's antecedent conduct in obtaining information for use in a Congressional proceeding. The court stated: "allowing a grand jury to question a senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them" (*id.*, p. 24). The court held, however, that the Clause does not cover private republication after the legislative speech (*id.*, pp. 24-28). But it ruled that a legislator causing such republication "may be protected from liability by a common law privilege" (*id.*, p. 28) akin to that of an executive official, citing *Barr v. Matteo*, 360 U.S. 564. The court then held, however, that this privilege means that a legislator "may not be questioned at all as to republication" (*ibid.*).

³ Initially the court held that Senator Gravel as an intervenor could properly appeal from the refusal to quash the subpoenas directed to Rodberg and Webber, on the ground that he would have no other method of testing the validity of the subpoenas and that compliance with the subpoenas would irreparably injure him (Pet. App. A, pp. 19-20).

The court then turned to the questions whether, and to what extent, the Speech or Debate Clause and common law privilege protect persons other than members of Congress. Viewing "personal aides in whom he reposes total confidence" as "indispensable" to a Congressman, the court held that legislative aides are afforded the same protection as a Congressman himself with respect to events related to their responsibilities during their period of employment (Pet. App. A, p. 29). On the other hand, a legislative aide "is not protected from inquiry as to events unconnected with intervenor at the time of occurrence" (*ibid.*).

Finally, the court considered the claim of privilege by third parties dealing with a Congressman or his aides. Relying upon its interpretation of *United States v. Johnson*, 383 U.S. 169, the court held that "any person who dealt with a legislator with respect to speech or debate cannot be inquired of if the object is to attack the legislator's motives in speaking" (Pet. App. A, p. 29). On the other hand, the court ruled that such third parties could be questioned "as to their own conduct regarding the Pentagon Papers including their dealing with intervenor or his aides" (*id.*, p. 30).

The court entered the following order (as modified in its decision on petition for rehearing):

- (1) No witness before the grand jury recently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are di-

7 7
rected to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions "in the broadest sense, including observations and communications, oral or written, by or to him, or coming to his attention" while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment. [Pet. App. C, pp. 36-37.]

SUMMARY OF ARGUMENT

I

Article I, Section 6 of the Constitution provides that "Senators and Representatives * * * for any Speech or Debate in either House * * * shall not be questioned in any other place." This language is pre-

Mr. Justice Brennan granted on January 24, 1972, a stay sought by Senator Gravel, thus leaving in effect the following order entered by the Court of appeals on November 29, 1971:

"It is ordered that the grand jury may pursue its inquiry into crimes relating to the so-called Pentagon Papers, provided that neither Senator Mike Gravel nor any member of his staff or of the staff of the Subcommittee on Buildings and Grounds shall be subpoenaed to testify, and no witness shall be questioned concerning the acquisition, use, publication, or republication of the Pentagon Papers by Senator Mike Gravel or by any member of the staff as above defined, until further order of this court. The restraining order entered October 29, 1971 shall remain in full force in all other aspects until further order of this court."

cise in protecting only members of Congress themselves and its limited scope cannot be attributed to inadvertence or a failure to foresee the modern roles of legislative aides, since the framers knew that there would be employees of the Houses of Congress who might have been protected and were aware that the privilege against arrest, contained in the same clause, had been extended to servants and family members at an earlier time in England.

The privilege of freedom of speech of the English Parliament extended only to members of Parliament. The Parliamentary privilege against arrest, which had earlier reached servants and family members, had been sharply cut back to protect only members of Parliament by 1769, and the language of Article I, Section 6 represented an attempt to avoid the abuses that had arisen from the extended privilege. *Thomas Jefferson's Manual of Parliamentary Practice* of 1801 explained: "It was probably from this view of the encroaching character of privilege that the framers of our Constitution * * * have only privileged Senators and Representatives themselves * * *"

This Court's decisions strongly support the position that the Speech or Debate Clause does not reach those who are not actually members of Congress. In *Kilbourn v. Thompson*, 103 U.S. 168, and *Powell v. McCormack*, 395 U.S. 486, the Court held that members were exempt from suit under the Clause but that employees were not so protected. In *Dombrowski v. Eastland*, 387 U.S. 82, the Court similarly found a member of Congress, the chairman of a subcom-

mittee, not subject to a civil action, while holding that the action against an employee, the counsel to the subcommittee, could proceed to trial. Since the chairman and the counsel obviously had a close working relationship, it was inevitable that at trial questions relating to the Senator's conduct would be asked, yet the Court did not suggest any limits to the kinds of questions that might be asked. In all three of these cases, and particularly in *Dombrowski v. Eastland*, the possible reasons for extending the protection of the Clause were essentially the same as those advanced by Senator Gravel in this case, and in all three they were rejected as insufficient to support an extension.

An analysis of the reasons behind the Clause, the degree of immunity necessary for legislative aides, and the strong social interest in full grand jury inquiry into criminal activity confirm the wisdom of this Court's decisions. The main function of the Clause is to protect members from liability arising from speech and debate, and inquiry of aides and private persons does not affect that. Nor does it interfere substantially with the member's work. Although it may conceivably result in some "embarrassment," that is not a sufficient basis for immunity, particularly since members are constantly subject to such embarrassment from private inquiry and criticism. Unlike the member himself, who is responsible to an electorate and can be disciplined by a House of Congress, the aide is subject to neither of these restraints on improper action.

The privilege asserted by Senator Gravel would reach a large number of assistants to members of Congress and might be subject to abuse. It could be asserted in many circumstances in which any interest in protecting the legislative process would be exceedingly remote. We believe that legislative aides do enjoy an immunity from civil liability coextensive with that of officials of the executive branch, cf. *Barr v. Matteo*, 360 U.S. 564. This immunity has been considered sufficient to ensure the proper performance of public responsibilities, and we perceive no basis for granting legislative aides a broader immunity from criminal liability and inquiry. *A fortiori*, no such immunity should be extended to third persons who happen to be dealing with a Congressman or his aides.

II

1. The Speech or Debate Clause protects only "Speech or Debate in either House" and does not provide any immunity for private republication of such speech or debate. The purpose of the Clause is to insure members' freedom of debate. The large number of issues Congress must now consider and the complexity of the problems it faces means that the members must place considerable reliance in performing their legislative functions upon information and discussion in committee reports and, insofar as it records things actually said in either House, upon the Congressional Record. It is presumably for this reason that the Speech or Debate Clause covers these two categories of Congressional documents.

The private republication of the Pentagon Papers was not a part of or necessary to "Speech or Debate in either House" and has no valid relationship to the functioning of Congress in the area of Speech or Debate. It was not intended to aid the members of Congress in performing their legislative duties but to make available to the public information which, as the court of appeals characterized it (Pet. App. 18), came into Senator Gravel's hands "unauthorizedly" but which he believed the general public should see.

The Speech or Debate Clause should not be extended to cover the distribution of protected Speech or Debate through private republication which a member has undertaken without official approval. The Clause does not cover all acts customarily done by a congressman but only those that are a part of Speech or Debate. *United States v. Johnson*, 383 U.S. 169, 172.

2. The English parliamentary privilege, on which the Speech or Debate Clause was based, did not cover republication. From the first case which so held in 1698 until the middle of the 19th century, the privilege did not cover republication of Parliamentary speeches. It was only as a result of an 1840 statute that a privilege was created for the publication of papers pursuant to an order of a House of Parliament. The American authorities, although they are few, similarly reject any privilege for republication of protected Speech or Debate.

3. The court of appeals also ruled that legislative aides have an immunity from testifying before a grand jury about republication by analogy to the absolute

immunity executive officers have for torts committed in the performance of their official duties. Cf. *Barr v. Matteo*, 360 U.S. 564. The latter immunity, however, is solely from liability for damages or perhaps from injunctive relief. It rests upon the policy consideration that, without such immunity, government officials might be deterred by the threat of damage suits from vigorously performing their duties. Legislative aides are unlikely to be similarly deterred because of the possibility that they may have to testify before a grand jury. We know of no case immunizing executive officials from having to appear before a grand jury, and there is no reason why legislative aides should have a greater privilege. Legislative aides, like everyone else, should perform the duty of all citizens to testify before a grand jury about any matter of which they have knowledge.

4. Even if the Speech or Debate Clause or legislative immunity permits a legislative aide to avoid testifying before a grand jury about republication of protected Speech or Debate, that immunity does not extend to third persons whose only possible connection with the legislative process was that they were negotiating for or handling the republication. Those persons were not performing essential aspects of the legislative process on behalf of "Senators or Representatives," so that making the immunity of the latter effective requires that it be extended to the former. Nor is a member of Congress "being questioned" about his "Speech or Debate" when third persons are questioned about their dealings with him or his aide.

ARGUMENT

I

THE SPEECH OR DEBATE CLAUSE DOES NOT LIMIT A GRAND JURY'S INQUIRY OF CONGRESSIONAL AIDES OR THIRD PARTIES

The precise question whether a Senator may invoke the Speech or Debate Clause to foreclose grand jury inquiry of legislative aides, or of third parties who have dealt with the Senator or his aides, has never been decided by this Court; but the language of the Clause, the pre-Constitutional history of parliamentary privilege, the intent of the framers revealed in contemporaneous documents, this Court's decisions with respect to the protection afforded Congressional employees, and a sensitive assessment of the proper needs of members of Congress balanced against society's interest in ascertaining and punishing criminal activity, all indicate that a Senator's immunity from grand jury questioning about activities that may constitute "Speech or Debate" does not extend to persons other than himself.

This does not mean that legislative aides are without the protection of any privilege; we believe that in their legislative work they should enjoy an official immunity as broad as that of responsible executive officials (see *Wheeldin v. Wheeler*, 373 U.S. 647; cf. *Barr v. Mateo*, 360 U.S. 564). This privilege would protect against liability for civil damages arising from their performance of their duties for a legislator. But the protection afforded members of Congress with respect to speech and debate against criminal

liability and inquiry concerning criminal guilt is an extraordinary one not shared by other government officials, except perhaps the President himself; its extension to aides is not required to enable members themselves or their aides properly to perform their duties; and such an extension to bar grand jury inquiry into possible criminal activity would constitute an unwarranted interference with the vital functioning of the grand jury, "a great historic instrument of lay inquiry into criminal wrongdoing" which has long held a central place in "the federal constitutional system" (*United States v. Johnson*, 319 U.S. 503, 512, 513) and which "has a right to every man's evidence" (*Piemonte v. United States*, 367 U.S. 556, 559, n. 2).

A. *The Language of the Clause.* Article I, Section 6 of the Constitution provides:

The Senators and Representatives * * * shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective House, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Though there may be room for argument as to what activities are covered by the phrase "Speech or Debate in either House," the Clause is linguistically precise as to the persons who enjoy its protection: only "The Senators and Representatives." Nonetheless, it is argued that the business of Congress has become much more complex, requiring, as it did not in 1787, profes-

sional assistants to members of Congress, and that the limited language should not preclude extension to those who assist the members in their duties. Even if this argument had force, it would not support the extension of the Clause by the court below to bar inquiry of private third parties. There was as much chance in the late eighteenth century as there is now that a grand jury investigation of possible criminal activity by private persons might include inquiry that would touch peripherally on the "motives or purposes behind the Senator's conduct" (See order of court of appeals, p. 7 *supra*). Had the framers wished to foreclose questioning of anyone about matters touching on a member's speech or debate, they would presumably have chosen language quite different from "The Senators and Representatives * * * shall not be questioned in any other Place."⁵

⁵ The language of the English Bill of Rights of 1689, 1 Wm. & Mary Sess. 2, c. 2, which this Court has recognized several times as an important source for the Speech or Debate Clause (see, e.g., *Kilbourn v. Thompson*, 103 U.S. 168, 202; *Tenney v. Brandhove*, 341 U.S. 367, 372; *United States v. Johnson*, 383 U.S. 169, 177-178) is much less precise about the persons to whom it reaches: "That the Freedom of Speech, and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." Similarly, Article V of the Articles of Confederation, an obvious possible model for the writers of the Constitution, is much less specific. It provides:

"Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrest and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, and breach of the peace."

Most of the colonies enacted specific legislation extending the

Nor, with respect to legislative aides, can the limited scope of the constitutional language be explained away by reference to changed legislative practices. Certainly it was contemplated in 1787 that the Houses of Congress would have paid employees—as the Houses of Parliament and the colonial legislatures had for many years—and it was foreseeable that legal actions or inquiries directed at these employees might reflect on the activities of the members. Thus there was a class of persons then for whom the rationale for protection was markedly similar to that advanced now for legislative aides; yet the language was narrowly drawn to reach only Senators and Representatives.

Moreover, as is reflected more fully in the history summarized in the following sections, the framers were aware of arguments that the privilege against harassment through arrest could be made more fully effective if it extended to family members and servants; yet the Clause quite clearly does not give them a privilege from arrest. Thus, the Clause's limitation to Senators and Representatives can not be attributed simply to a lack of foresight concerning the modern roles of legislative aides. The framers made a deliberate choice not to extend the privileges against arrest and guard-

related privilege of freedom from arrest to servants. Clarke, *Parliamentary Privilege in The American Colonies*, 113. Given the availability of the more general and open-ended language concerning speech and debate of the English Bill of Rights and the Articles of Confederation, and the specific colonial coverage of certain nonmembers in the related privilege against arrest, the precise words of the present Clause can hardly be assigned to caprice or inattentive draftsmanship.

ing speech and debate to cover every individual to whom the underlying rationales might conceivably reach. They recognized that extraordinary privileges carry some social cost, and they declined to extend the coverage of the Clause beyond Senators and Representatives, for whom direct protection was most essential.

B. Pre-Constitutional History. The historical development of the English parliamentary privilege for speech and debate (see generally *United States v. Johnson*, 383 U.S. 169, and the brief for the United States in that case (No. 25, October Term 1965, pp. 19-24)) sheds little direct light on its possible applicability to legislative aides, but the history of the cognate privilege from arrest strongly reinforces our view that the framers of our Constitution deliberately decided not to extend either privilege further than to the members themselves.

The privilege of freedom of speech within Parliament developed as an aspect of the "long struggle for parliamentary supremacy" (*United States v. Johnson*, 383 U.S. 169, 178) vis-à-vis the Crown. It was asserted in response to the fear, derived from painful historical precedent, that speeches made in Parliament would be the basis for summary imprisonment or other persecution of a member who offended the King, and for royal intervention into the proceedings of Parliament. A crucial aspect of the privilege was the exclusion of strangers from Parliamentary debates, since strangers might report the words of a member to the King. "So long, therefore, as the Commons were obliged to protect themselves against

the rough hand of the prerogative, they strictly enforced the exclusion of strangers." (1 May, *The Constitutional History of England 1760-1860* (1912 ed.) 327-385). Since the privilege related peculiarly to the protection of members against royal punishment for words that displeased the Crown, there was little or no occasion on which the privilege of freedom of speech might have been asserted on behalf of non-members; and that privilege was not claimed on their behalf.⁶

In contrast to the parliamentary privilege of speech, the cognate privilege against arrest did clearly

⁶ The case of Thomas Haxey (1397) has sometimes been cited as an early assertion of the privilege of freedom of speech, and Haxey may not have been a voting member of Parliament but a representative of the clergy attending Parliament, see Wittke, *The History of English Parliamentary Privilege*, 26 Ohio State Univ. Bull., No. 2, p. 24 (1921). Haxey was charged with treason and convicted for introducing a bill in the House of Commons criticizing expenditures of the royal household. With the accession of Henry IV, Haxey successfully petitioned the King in Parliament to reverse the judgment as being against the law and custom of Parliament. Several commentators have rejected the idea that the petition represented a claim of parliamentary privilege. J. E. Neale in *The Commons' Privilege of Free Speech in Parliament* (Tudor Studies, 1924) 259, in "lay[ing] the ghost of Haxey's case, which has troubled us too long," observed:

"In the first place privilege of free speech covers members alone * * *. Moreover, privilege was never a plea against a charge of treason; and in reality the petition in favour of Haxey was either grounded upon the irregularity of the trial * * * or it was grounded upon the contention that the offence was not treason."

See also Taswell-Langmead, *English Constitutional History* (11th ed., Plucknett, 1960), 175. In any event, even if, contrary to this interpretation, Haxey's case does have some bearing on the Parliamentary privilege of freedom of speech, it seems

apply to certain non-members at some stages of its history, but underwent considerable contraction before the Constitution of this country was adopted, and as indicated above, the language of the Clause in our Constitution respecting both freedom from arrest and freedom of debate represents a deliberate choice for a limited rather than expansive privilege.

The privilege against arrest was first noted in the statute of 5 Henry IV (1403), which provided that members of Parliament and their servants were immune from arrest during the time Parliament was sitting, and shortly before and after.⁷ As the power of Commons grew, however, the scope of this privilege widened. Immunity was extended beyond members and their servants to their family and estates. These extensions led to such abuses that "[p]rivilege thus became a menace to the rights of the individual, who was deprived in this fashion of his ordinary common law remedy" Wittke *op. cit.*, *supra*, 41.

For example, in the name of privilege, members of Commons and their servants were declared to be outside the reach of the common law courts during the

apparent that, whatever his precise formal status, by introducing the bill he functioned much like a member of Commons; and his case has little relevance for those who do not propose legislation, vote, or debate, but instead assist legislators in the performance of their duties.

⁷ See Barrington, *Observation on The More Ancient Statutes* (4th ed. 1775) 375.

As in our Constitution, "treason, felony and surety [breach] of the peace" have always been exceptions to the immunity, May, *Parliamentary Practice* (16th ed. 1957) 68. Generally the immunity was limited to immunity from civil arrest, *Williamson v. United States*, 207 U.S. 425.

time that Parliament was sitting. This led to the sale of "protections" issued under the seal of particular members, providing in effect that named persons were servants of the member and should be free from arrest, imprisonment and molestation during the term of Parliament.⁸ Additionally, using the privilege of its members from civil arrest or molestation, Commons successfully asserted the power to punish trespass on the estates of members, theft of their goods or those of their servants and the arrest of their servants.⁹

After the Restoration, efforts were made to eliminate these abuses. Thus, by 1700, legal actions against members of Parliament and their servants could be brought at almost any time when Parliament was not in session (12. and 13 William III, c. 3). In 1769 the statute of 10 George III, c. 50, removed from servants the protections that they had theretofore enjoyed. That law provided that anyone could commence or prosecute an action or suit against any member of Parliament, his family, or his servants; that a member was not immune from service of process; and that in no way could an action be stayed,

⁸ Thus Wittke, *op. cit.*, *supra*, 41 n. 75 observes: "One writer on this period came to the following conclusion: 'It has to be admitted that for no purpose was parliamentary privilege more valued than for escaping from payment of lawful debts' A. S. Turberville, *The House of Lords in the Reign of William III*, 77 (Oxford Historical and Literary Studies, 1913)."

⁹ See Wittke, *op. cit.*, *supra*, 41-43; Taswell-Langmead, *English Constitutional History* (11 ed. Plucknett, 1960) 321-322, 580-582.

dismissed, or delayed on the basis of a claim of Parliamentary membership. The sole exception there to was provided in Sec. 2:

[T]hat nothing in this Act shall extend to subject the person * * * of any of the [members] * * * to be arrested or imprisoned upon any such suit or proceedings. [Emphasis added.]¹⁰

This provision was enacted eighteen years before our Constitution was adopted, and the framers presumably were aware of the contraction of the privilege against arrest that it represented.

We do not suggest that this pre-Constitutional Eng-

¹⁰ The nature of the problem and the solution afforded by this statute have been noted by an eminent commentator: "Members and their servants had formerly enjoyed immunity from the distress of their goods, and from all civil suits during the periods of privilege. Such monstrous privileges had been flagitiously abused; and few passages in Parliamentary history are more discreditable than the frivolous pretexts under which protections were claimed by members of both Houses, and their servants." 1 May, *The Constitutional History of England* (1912), 358. The same commentator has written:

"By the 10th Geo. III, c. 50, a very important limitation of the freedom of arrest was effected. Down to that time the servants of members had been entitled to all the privileges of their masters [with certain minimal limitations] but by the 3rd section of the 10th Geo. III., the privilege of members to be free from arrest upon all suits, authorized by the Act, was expressly reserved; while no such reservation was introduced in reference to their servants. And thus, without any distinct abrogation of the privilege, it was, in fact, put an end to, as executions were not to be stayed in their favor, and their freedom from arrest was not reserved."

May, *Treatise On The Law, Privileges, Proceedings, And Usage of Parliament* (7th ed. 1873) 130.

lish history"¹¹ is, by itself, dispositive of the issue of the applicability of our Speech or Debate Clause to legislative aides. But, when read in light of the constitutional language and contemporaneous statements, it leaves no doubt that the framers did not inadvertently refer only to Senators and Representatives. They consciously rejected creating a privilege on behalf of other persons whom legislators from time to time might wish to bring within the ambit of their own protection.

C. *The Intent of the Framers.* Since Article I, Section 6 of the Constitution was approved at the Constitutional Convention without discussion (5 *Debates On The Adoption of the Federal Constitution* (Elliot ed. 1845) 378, 406; *United States v. Johnson, supra*, 383 U.S. at 177), its precise boundaries are not marked out by any explicit legislative history. Reference to relatively contemporaneous materials, however, confirms the conclusion drawn from the language itself and the pre-Constitutional development of Parliamentary privilege that a conscious choice was made not to extend the Clause to persons other than the members of Congress themselves.

¹¹ The American Colonial experience in large measure tracked the English background including the protection of servants from arrest. See generally, Clarke, *Parliamentary Privilege in The American Colonies* (1943). This protection was cut back after the federal constitution was adopted until today only Virginia maintains the privilege on behalf of servants. See Va. Code (1950), § 30-4 to § 30-8. For a collection of the relevant state Constitutional provisions see *Tenney v. Brandhove*, 341 U.S. 367, 374-376.

The framers' awareness of the value of uninhibited legislative speech is evidenced by their approval of the Clause,¹² but they were also cognizant of the abuse of parliamentary privilege and they feared legislative excess. Madison cautioned that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." *The Federalist* No. 48 (Bourne ed. 1914) 339. He argued that specific barriers should be erected against abuse of power by Congress (*id.* 338-343). In a similar vein, Jefferson wrote to Madison in 1789 that "[t]he tyranny of the legislatures is the most formidable dread at present and will be for long years." *Tenney v. Brandhove*, 341 U.S. 367, 375 n. 4; See also *United States v. Brown*, 381 U.S. 437, 443, 444.

That the limitation, in Art. I Sec. 6, of the freedom from arrest and freedom of speech or debate to "Senators and Representatives" was deliberate is perhaps most clearly indicated in *Thomas Jefferson's Manual of Parliamentary Practice* of 1801. After tracing the growth of English parliamentary privilege "for centuries with a firm and never-yielding pace," he observed (Sec. III) ::

¹² James Wilson stated the purpose of the speech or debate privilege as follows: "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38, quoted in *Tenney v. Brandhove*, 341 U.S. 367, 373.

It was probably from this view of the encroaching character of privilege that the framers of our Constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged "*Senators and Representatives*" themselves from the single act of "arrest in all cases except treason, felony, and breach of the peace, during their attendance at the session of their respective Houses, and in going to and returning from the same and from being questioned in any other place for any speech or debate in either House." [Emphasis added; S. Doc. No. 1, 90th Cong., 1st Sess., pp. 383-384.]

D. *Judicial Decisions On The Meaning of the Speech and Debate Clause.*¹³ The precise questions presented by this case are novel, but this Court has considered the Speech or Debate Clause in other contexts and its decisions strongly support the interpretation of the Clause we urge. It is useful in approach-

¹³ The American case law on the constitutional immunity from arrest does not advance the inquiry because the clause has been involved in little litigation. This is in large measure due to the inherent limitations in the wording of the clause. From the earliest assertions of the privilege, "treason, felony and breach of the peace" were exceptions (see Note 7. *supra*). Essentially the immunity has been merely one from civil arrest (*Williamson v. United States*, 207 U.S. 425). And even in civil cases a Congressman may be served with process (*Long v. Ansell*, 293 U.S. 76). While civil arrest was common in England and in America at the time of the adoption of the Constitution, it is no longer so. Thus, as the court observed in *Long v. Ansell*, 69 F. 2d 386, 388 (C.A. D.C.):

That which at the time of the adoption of the Constitution was of substantial benefit to a Member of Congress has been reduced almost to a nullity.

ing the relatively few decisions of this Court which have involved the Clause to have firmly in mind the central thrust of Senator Gravel's position. It is that if aides do not enjoy a privilege coextensive with that of the members for whom they work, inquiry directed at an aide may serve as a way of questioning the member's conduct and embarrassing him, and as a way of impairing the member's performance of his duties through harassment and possible inhibition of the aide. The crucial point of this discussion is that these same contentions were equally applicable to the related problems with which this Court has dealt, and they have been implicitly rejected as insufficient to sustain extension of the coverage of the Clause to persons other than Senators and Representatives.

In two suits brought to correct erroneous Congressional action in which members of Congress were joined with employees of Congress as defendants, this Court has, while dismissing the suits as to the Congressmen, sustained jurisdiction over the employees and decided the cases on the merits adversely to the Congressional position,

The first of these cases, *Kilbourn v. Thompson*, 103 U.S. 169, was this Court's original opportunity to consider the Speech or Debate Clause. There, a committee of the House had been investigating certain real estate activities and subpoenaed the plaintiff Kilbourn to testify; he refused. The House then ordered him jailed for contempt. After being released on a writ of habeas corpus, Kilbourn filed suit against the committee members and the sergeant-at-arms for false imprisonment. This Court held that although the

Speech or Debate Clause protected the House committee members, the sergeant-at-arms could be held liable. In support of that decision, the Court cited language from *Stockdale v. Hansard*, 9 Ad. & E. 1, 114, 112 Eng. Rep. 1112, 1156 (1839) (see *infra* at p. 48), refusing to extend the parliamentary privilege of freedom of speech to non-members; and this Court observed (103 U.S. at 202):

Taking this to be a sound statement of the legal effect of the [English] Bill of Rights and of the parliamentary law of England, it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source.

In *Powell v. McCormack*, 395 U.S. 486, decided nearly 90 years after *Kilbourn*, this Court, again without dissent on the point, reached the same conclusion that the Clause does not protect Congressional employees.¹⁴ Congressman Powell brought suit against five members of the House, the Speaker, the Clerk and the Doorkeeper seeking an injunction to restrain them from executing a resolution to deprive him of his House seat. While the Court found that the legislators were protected from suit under the Clause, it held that the legislative employees were amenable to judicial action (395 U.S. at 504):

The Court first articulated in *Kilbourn* and followed in *Dombrowski v. Eastland* the doctrine that, although an action against a Congressman may be barred by the Speech or

¹⁴ Mr. Justice Stewart, dissenting, considered the case moot. 395 U.S. at 559.

Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts.¹⁵

In stating the reasons for this difference in treatment, the Court said (395 U.S. at 505-506):

The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the

¹⁵ In *Tenney v. Brandhove*, 341 U.S. 367, 378, in which state legislators were held 'not liable under a federal civil rights statute, the Court had affirmed the vitality of *Kilbourn*.

For a recent lower court case following *Kilbourn* and *Powell*, see *Stamler v. Willis*, 415 F. 2d 1365, in which the Court of Appeals for the Seventh Circuit reversed the dismissal of an action for injunctive and declaratory relief challenging the House Un-American Activities Committee, and remanded to permit the joinder of "appropriate [non-Member] agents of the House Committee" (415 F. 2d at 1368) so that effective relief might be granted if plaintiffs succeeded on the merits. See also *Hentoff v. Ichord*, 318 F. Supp. 1175 (D. D.C.).

United States Servicemen's Fund v. Eastland, Civil No. 1474-70 (D. D.C., decided October 21, 1971) in which the court, in an injunctive action, declined to order a subcommittee's counsel to answer certain questions posed by plaintiff seeking pretrial discovery, is not inconsistent with the basic principle of *Kilbourn* and *Powell*, or the position of the government in this case. The court did refer to a Senate resolution authorizing counsel to testify only as to matters of public record, declaring that there was no authority for the proposition that a "legislative employee's vulnerability to suit requires this Court to afford complete satisfaction of plaintiffs' discovery requests when such discovery is specifically barred by a Senate resolution" (slip op. 4). But the court did not explicitly rest on the Speech or Debate Clause; it did not hold that Congress can immunize employees from all inquiry in civil suits, much less that one member of Congress can immunize his own employee from all inquiry in a criminal investigation.

performance of their legislative tasks by being called into court to defend their actions. A legislator is no more or no less hindered or distracted by litigation against a legislative employee calling into question the employee's affirmative action than he would be by a lawsuit questioning the employee's failure to act. * * * Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves. In *Kilbourn* and *Dombrowski* we thus dismissed the action against members of Congress but did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued. * * *

In *Dombrowski v. Eastland*, 387 U.S. 82, decided two years prior to *Powell*, this Court also distinguished the immunity of members of Congress from the possible immunity of those who assist them. That case involved a civil action against the chairman and counsel of the Internal Security Subcommittee of the Judiciary Committee of the Senate who, plaintiffs claimed, had conspired with state officials to seize property and records of petitioners in violation of the Fourth Amendment. The Court, *per curiam*, affirmed the dismissal of the suit against the Senator because the "record does not contain evidence of his involvement in any activity that could result in liability," since "[i]t is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution * * * that legislators engaged 'in the sphere of

legitimate legislative activity' * * * should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." (387 U.S. at 84-85). Nevertheless, the Court held that, as to Mr. Sourwine, counsel for the subcommittee, there was a sufficient factual dispute to warrant a trial, stating:

This Court has held, however, that this doctrine [of legislative immunity] is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves. * * * [387 U.S. at 85].

Although the Court did not say explicitly that the activities of the subcommittee chairman or counsel were within the precise scope of Speech or Debate, the statement that the doctrine of "legislative immunity," which has "its roots * * * in the Speech or Debate Clause," was applicable, though less absolutely, to legislative employees might be taken to imply that the Clause does cover employees.¹⁶ Any pos-

¹⁶ Respondents in *Dombrowski*, in a brief signed by the Solicitor General (No. 118, Oct. Term, 1966), had suggested such coverage. *Doe v. McMillan*, No. 71-1027, C.A. D.C., decided January 20, 1972, petition for certiorari pending, No. 71-6356, does apparently adopt such a construction of the Clause (see slip. op. 17-19). Since the decision in *Doe*, turns substantially on the court's finding that the non-members were, in contrast to the situation in *Kilbourn*, "acting pursuant to valid legislative authorization" (slip. op. at 17), it is unclear what view the court would have taken had their acts been wrongful. In any event, the case involves a civil suit and the result is fully consistent with the interpretation of the Clause urged here, not only because the challenged acts of publishing and distributing the report of a House Committee on the District of Columbia school system was proper, but also because the officials sued

sible doctrinal implications of this kind were put to rest by the subsequent and more extensive opinion in *Powell*, which rejects the assertion that the protections of the Clause reach employees.¹⁷

What *Dombrowski v. Eastland* held, however, remains of great significance for this case. That the subcommittee chairman and the chief counsel to the subcommittee had a close working relationship is revealed by the record in that case and is a matter of common knowledge. Given the undisputed facts in that case (see Statement in Brief for Respondents in *Dombrowski*), it could not be doubted that if the action against Mr. Sourwine for damages and injunctive relief proceeded to trial, not only was it possible that actions authorized by Senator Eastland might be subject to scrutiny, it was virtually inevitable that Mr. Sourwine's contacts with the Senator would become a part of the record. Yet this Court did not, as a consequence, immunize Mr. Sourwine from liability or from describing his own activities, nor did it suggest or even intimate that some areas of relevant questioning might be foreclosed because they might touch on the conduct and motives of Senator Eastland. That

were protected by an official immunity independent of the Speech or Debate Clause (see slip. op. 20-25).

¹⁷ We, of course, agree with the opinion in *Dombrowski v. Eastland* that legislative employees do enjoy immunity, but one that is less absolute than that of legislators. Nor do we question that the presence of the Speech or Debate Clause is relevant to the determination whether legislative employees are privileged; it was also relevant to the determination of immunity of state legislators under the federal civil rights statute in *Tenney v. Brandhove*, 341 U.S. 367. Our submission is that the Clause itself does not confer immunity on employees.

Senator Gravel should not be able to protect Dr. Rodberg and private third parties from grand jury inquiry into possible violations of the criminal law follows *a fortiori* from the Court's refusal to protect against inquiry in the context of a civil suit.

Although this Court has never passed specifically on the relevance of the Clause to inquiry of private persons who have dealings with a member of Congress, it follows that if the Clause cannot be asserted on behalf of employees it is also not applicable to private persons. In *United States v. Johnson*, 337 F. 2d 180, the Fourth Circuit reached just this conclusion. Although it held that a Congressman could not be convicted of a conspiracy involving the making of a speech on the floor of the House, the challenge of Johnson's non-member co-defendants to the conspiracy charge was rejected since "none of the privileges of Article 1, section 6 pertain to the defendants who are not members of Congress * * *" (337 F. 2d at 192).¹⁸

E. *The Degree of Immunity Needed for Effective Functioning of the Legislative Process.* A careful assessment of the reasons behind the Speech or Debate Clause, the competing social interest in full grand jury inquiry into criminal activity, and the degree of immunity necessary for legislative aides and employees to function effectively confirm the wisdom of this Court's holdings in *Kilbourn*, *Powell*, and *Dombrowski v. Eastland* and demonstrate the unwar-

¹⁸ This Court, in reviewing the decision, explicitly indicated that it was not passing on this third-party issue. *United States v. Johnson*, 383 U.S. 169, 172-173, n. 3.

ranted expansiveness of the positions urged by Senator Gravel and adopted by the court below in this case.

The history of the parliamentary privilege of freedom of speech shows that the primary purpose it served was to protect against Crown actions, such as summary imprisonment, directed at offending speakers, and there can be little doubt that the main function of the provision that "Senators and Representatives * * * for any Speech or Debate in either House * * * shall not be questioned in any other Place" is to immunize legislators from civil and criminal liability for activities within the scope of the Clause. But the Clause does more than guard against substantive liability. It is designed "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions" (*Powell v. McCormack*, 395 at 505), and it protects them "not only from the consequences of litigation's results but also from the burden of defending themselves" (*Domrowski v. Eastland*, 387 U.S. at 82). It is also possible that the Clause has the effect of reducing the chance that a member of Congress may be embarrassed by inquiry into his activities, although he is, of course, subject to similar embarrassment as a consequence of private inquiry and criticism.

Simply to enumerate the protections of the Speech or Debate privilege is to suggest how attenuated are the arguments for coverage of persons other than members of Congress. The member himself is obviously not directly affected by the possible liability of aides

or private persons. At the most it could be said that liability might make it more difficult for the member to hire and keep effective aides, but that is far removed from the degree of interference caused if the member himself is subject to liability. Similarly, inquiry of aides and private persons does not divert the member from his duties, though the required expenditure of time by an aide may involve a minimal interference with the operations of his office. It is true that embarrassment may conceivably be caused by questions that reveal the "motives or purposes" behind a member's conduct, but that hardly seems a sufficient justification for an absolute bar to such questions, particularly before a grand jury, where the proceedings are secret. In short, the privilege for members themselves is much more crucial for a fearless and independent legislature than any conceivable privilege extended to nonmembers.

We reiterate that the Speech or Debate Clause creates an extraordinary privilege for members of Congress; its protection against criminal liability and inquiry is not shared by executive officials or judges.¹⁹ One reason this expansive protection is tol-

¹⁹ The privilege of executive officers not to give evidence which would jeopardize national security (*United States v. Reynolds*, 345 U.S. 1) or diplomatic relations (*cf. Totten v. United States*, 92 U.S. 105) is strictly "limited by its underlying purpose" (*Halpern v. United States*, 258 F. 2d 36, 44 (C.A. 2)). No executive official is exempt from subpoena. See *e.g. Marbury v. Madison*, 1 Cranch 137, 143-144; *United States v. Burr*, 25 Fed. Cas. 30, 34; *United States v. Smith*, 27 Fed. Cas. 1152; *Thompson v. German Valley R. Co.*, 22 N.J. Eq. 111, 113 (State Governor). If after appearing the executive official asserts the privilege, the court must weigh the claim of

erable is because members of Congress are subject to special kinds of scrutiny. They are responsible to their constituents and subject to continuing criticism, and they may be voted out of office if their official actions are found wanting. Moreover, they are subject to the discipline of their own Houses. "Each House may * * * punish its Members for disorderly Behaviour; and, with the Concurrence of two thirds, expel a Member." (U.S. Const., Art. I, § 5). That aides of individual members are not directly responsible to an electorate and very probably are not subject to Congressional discipline are powerful reasons for not extending to them the unique immunity from criminal liability and inquiry of the Speech or Debate Clause.

This conclusion is further buttressed by a consideration of some of the circumstances in which the position of Senator Gravel and the court below could bar effective grand jury investigation. It could easily prevent discovery of the criminal guilt of private third parties when neither the member nor his aide is even suspected of wrongdoing. Suppose the aide of a Senator opposing legislation is offered forged papers, which the aide is told are genuine, that appear to establish a damaging relationship between some Senators supporting the legislation and companies that would benefit from its passage. After

privilege against the need for the evidence, and assure itself that the claim is made in good faith (*United States v. Reynolds*, *supra*, 345 U.S. at 7-11). No court has recognized for executive officers a privilege such as that claimed by the Senator's aides, to refuse to answer any questions at all concerning their official duties.

the aide has obtained the papers, the Senator makes use of them in a speech against the legislation. Subsequently, the possibility of a forgery comes to light. The holding of the court below would permit the Senator to immunize his aide from answering grand jury questions about any contacts with the producer of the forged papers, since these occurred in the course of the aide's employment.²⁰ Such a result would produce a gross distortion of the Speech or Debate Clause.

Suppose, instead, the aide learns that the papers are forged but is bribed to conceal this knowledge from the Senator. Again, since the Senator is interested in the papers and their receipt relates to the aide's legislative duties, the holding of the court below would immunize the aide from inquiry and liability, at least if the Senator sought such immunization. Yet, to put in the hands of a single Senator the possible criminal liability of an aide performing clearly corrupt and unauthorized acts seems far removed from the constitutional clause.²¹

Nor would the situation be fundamentally different if the Senator himself had conspired with his aide and a private person to produce the forged papers.

²⁰ The court below does not make it clear whether the aide enjoys protection of the Speech or Debate Clause simply because of his status or only because his Senator has intervened on his behalf.

²¹ It is no answer to say that the innocent Senator will have no reason to protect guilty third parties or aides. He may well not wish it to be established that he used forged papers, even innocently, and he might also fear that any branding of his aide as a criminal may reflect unfavorably on him.

His own privilege of freedom from criminal liability and inquiry is sufficient to protect the proper functioning of the legislative process; it should not be extended to all those caught up in the criminal enterprise. See *United States v. Johnson*, 337 F. 2d 180, 192 (C.A. 4), affirmed on another issue, 383 U.S. 169.

Senator Gravel's argument does not involve merely a modest extension of the Clause to a relatively few individuals. Many Senators and Congressmen have very sizeable staffs in which a substantial number of aides are doing work arguably related to speech or debate. It would be extraordinarily difficult to differentiate persons on committee staffs who work closely with particular members, and may even function like personal aides in some contexts, from those who are formally part of a member's staff. Neither the court below nor Senator Gravel attempts to draw distinctions based upon the peculiar position of trust a particular aide may occupy or upon the special importance to the legislative process of a particular kind of work related to speech or debate. We, too, doubt the viability of any line based on such distinctions; but for us that merely reinforces the soundness of the principle that only members themselves enjoy the unique protections of the Speech or Debate Clause.

Moreover, the sweeping privilege here asserted might be abused by members to protect those not closely related to their functioning. That possibility is suggested not only by the English history regarding the Parliamentary privilege against arrest, but also by

the fact in this case that Senator Gravel hired Dr. Rodberg on the day he made public the Pentagon Papers.

We believe that legislative aides enjoy a substantial immunity from damage suits, but we find no persuasive reason why it is required for the effective performance of Congress that those attached to members be extended an immunity that is unparalleled in the coordinate branches. This Court early held that judicial officers are immune from actions for civil damages caused by their judicial acts, *Bradley v. Fisher*, 13 Wall. 335, and more recently has ruled that officials of the executive branch of government are likewise absolutely immune from civil damage claims for "action * * * taken * * * within the outer perimeter of [the] line of duty," *Barr v. Matteo, supra*, 360 U.S. 564, 575. It has never been suggested, however, that executive officials or judicial officers need be wholly free from criminal liability or from responding to grand jury inquiries about all matters relating to their employment. We agree with this Court's suggestion, *Wheeldin v. Wheeler*, 373 U.S. 647, 650, 651, that legislative aides may enjoy an immunity from damage suits like that of executive officials. That immunity has been deemed a sufficient protection for the exercise of the duties of executive and judicial officers and we perceive no special justification for granting a special immunity against grand jury inquiry and criminal liability to legislative aides (see discussion, *infra*, pp. 51-54).

Thus a consideration of the possible need for immunity indicates—what the language and history of

the Clause and its judicial interpretation show—that legislative aides and private persons are not, and should not be, protected by the Clause from legitimate grand jury inquiry into possible criminal acts.

II

THE SPEECH OR DEBATE CLAUSE DOES NOT COVER PRIVATE REPUBLICATION OF PROTECTED SPEECH OR DEBATE

The Speech or Debate Clause protects only "Speech or Debate in either House." It does not provide any immunity for private republication of such Speech or Debate. The Clause in terms does not extend beyond the making of a speech or the engaging in debate by a member within the confines of the Houses of Congress themselves; it provides only that *members* cannot be questioned elsewhere "for" any Speech or Debate in either House. There is nothing in the Clause that supports Senator Gravel's contention that the Clause also protects the private republication by non-government agencies of a member's Speech or Debate, and the court of appeals correctly rejected it.

That private republication is beyond the scope of the Speech or Debate Clause is shown by the following considerations: (1) Such immunity is unnecessary to the proper performance of the duties of members of Congress. (2) the English parliamentary privilege, from which the Speech or Debate Clause was drawn, does not cover republication. (3) The American authorities similarly have not so extended the Clause. (4) Any legislative privilege which may

exist - for congressional aides protects them only against tort liability and perhaps against injunctive relief; it does not immunize them from either criminal prosecution or testifying before a grand jury. (5) Finally, any possible privilege that congressional aides might have against giving grand jury testimony with respect to private republication of protected Speech or Debate does not extend to third persons who participate in the republication, such as the representatives of the publishing firms with whom Senator Gravel or his aides negotiated for republication.

A. *Republication is Not Protected "Speech or Debate" Under the Clause.* The purpose of the Speech or Debate Clause, as developed in Point I above, is to give the members of Congress sufficient protection against liability for or questioning about certain of their legislative actions to insure that the threat or possibility thereof will not impede or inhibit them in the performance of their official duties. The Clause protects the members "for what they do or say in legislative proceedings," since "the legislature must be free to speak and act without fear of criminal and civil liability" (*Tenney v. Brandhove*, 341 U.S. 367, 372, 375). The immunity, however, does not cover everything done by a member in the performance of his legislative function; it covers only "Speech or Debate in either House." As the court of appeals recognized in this case (Pet. App. 23), the Clause "is intended to ensure freedom of debate"; cf. *United States v. Johnson*, 383 U.S. 169, 180-182.

Adequate debate on and informed consideration of pending legislation, as well as proper oversight of existing statutes, requires an informed legislature. The volume of business that Congress now transacts—involving a vast number of different subjects and increasingly complex and difficult problems—makes it impossible for each member to acquire personal knowledge of every aspect of every pending issue. Individual members necessarily must therefore rely to a great extent upon the hearings and reports of the committees which handle Congressional business in its early stages, and upon the debates on the floors of Congress.

Keeping the members of Congress informed about what happens in committees and on the floor thus is necessary to effective "Speech or Debate." It is presumably for this reason that, as the court of appeals noted (Pet. App. 22), the Clause has been interpreted as covering not only legislative speech and debate, but also the contents of committee reports "addressed to Congress." Presumably, the Clause also would cover the contents of the Congressional Record, at least insofar as it records things actually said in either House. See *McGovern v. Martz*, 182 F. Supp. 343, 347 (D. D.C.). It is appropriate that the Clause cover these two categories of Congressional publications because they are the means Congress has selected for informing its membership about its business.

But the private republication of the Pentagon Papers by the Beacon Press, pursuant to arrangements involving Senator Gravel and Dr. Rodberg,

was not a part of or necessary to "Speech or Debate in either House." It involved no supplying to the members of Congress of information that they needed in performing their legislative duties. The contents did not relate to any pending Congressional business. The material was neither the product of a Congressional hearing, nor something supplied to Congress to be considered in connection with pending legislative business.

To the contrary, it was highly classified material which had been prepared by the Department of Defense for the executive branch of the government and which, as the court of appeals characterized it (Pet. App. 18), came into Senator Gravel's hands "unauthorizedly." Even its initial publication at the late evening hearing of Senator Gravel's subcommittee could hardly be said to have had any demonstrable relationship to the need of members of Congress for information related to pending legislative matters. Indeed, copies of the study had previously been supplied to the Congress under conditions that would give the membership access to the material while at the same time protecting its security classification.²²

But, however one may characterize the propriety of Senator Gravel's initial publication of this material, the subsequent private republication cannot be viewed

²² The conditions under which the material was supplied to Congress are stated in an affidavit of J. Fred Buzhardt, General Counsel of the Department of Defense and the attachments thereto. The affidavit was filed in the cases of *Moss v. Laird*, and *Fisher v. Department of Defense*, D.D.C., Civil Actions No. 1254-71 and 1865-71, and is reprinted in the appendix to this brief.

as having any valid relationship to the functioning of the Congress in the area of speech or debate. The republication by the Beacon Press, for general sale to the public, was not a part of and had no connection with any Congressional speech or debate, either on the floor of Congress or in committee. See *Hentoff v. Ichord*, 318 F. Supp. 1175, 1180-1181 (D. D.C.). It was intended not to aid the members of Congress in performing their legislative duties, but to make available to the public information which had come into Senator Gravel's hands and which he believed the general public should see.

The Chairman of the Senate Public Works Committee, to whom Senator Gravel, as chairman of the subcommittee, was responsible, apparently recognized that the republication was not necessary or appropriate to the proper performance of any legislative function, since he refused to authorize it.^{22a}

Indeed, Senator Gravel makes no attempt to show that the republication of the Pentagon Papers had any meaningful relationship to the proper performance of the Speech or Debate function of Congress. Rather, his argument is that members of Congress have a duty to inform "the electorate about acts committed by the Executive and, specifically, with respect to Executive conduct in foreign relations" (Pet. No. 71-1017, p. 7); that the republication was a proper step in the performance of that duty; and that the Speech or Debate Clause broadly covers all aspects of this Congressional "informing function" (*id.*, p. 8).

^{22a} Transcript of Proceeding, September 10, 1971 (Dr. Rodberg's Motion to Quash Grand Jury Subpena), p. 52.

The claim is a sweeping one. Senator Gravel does not argue that the material he was seeking to distribute through the republication was designed primarily to inform his own constituents or to tell them about his own actions. Instead, he asserts a right to "inform [the] electorate" generally about "Executive conduct in foreign relations." Indeed, Senator Gravel invites this Court to extend the Speech or Debate Clause to all things "generally done" by legislators (Pet. No. 71-1017; p. 7).

But, as the court of appeals pointed out: "Our courts have expanded the privilege beyond the act of debating within Congress a proposal before it only when necessary to prevent indirect impairment of such deliberation" (Pet. App. 26). For example, it may be part of a Congressman's contemporary role to intercede with executive agencies on behalf of constituents; yet this Court has stated:

No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process. * * *

[*United States v. Johnson*, 383 U.S. 169, 172]²³

In contrasting intercession with executive agencies with "the due functioning of the legislative process," the Court—consistent with all prior interpretations of the Clause—was limiting its operation to conduct

²³ The Court could not have been referring to corrupt or improperly motivated intercessions only, since, if intercessions are Speech or Debate, they would be protected, whether they are innocent or corrupt, *United States v. Johnson*, *supra*.

reasonably related to the law-making function of Congress.

Similarly, the fact that Congressmen customarily communicate with their constituents should not place such communication beyond scrutiny. It is not so closely related to "the due functioning of the legislative process" as to warrant constitutional immunity from "question[ing] * * * in any other Place."

Moreover, the republication here involved was not directed to Senator Gravel's constituents, but to the public generally. It was not authorized by either the chairman of the full Committee or by the Senate itself. Where the House or Senate approves republication of Committee reports or documents, as it sometimes does (cf. *e.g.*, *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C.)), that approval at least reflects the view of the Chamber that it is an appropriate part of the legislative process to make further distribution of the material. The situation is quite different, however, when an individual member himself arranges for republication.

The provision of adequate information to the public could be adequately assured by giving legislative aides immunity from tort liability for republication of protected Speech or Debate—although such a privilege has not been generally recognized (see *infra*, pp. 49-51).

B. The English Parliamentary Privilege, on Which the Speech or Debate Clause is Based, did not Cover Republication.

As this Court has noted (*Tenney v. Brandhove*, 341 U.S. 367, 372-375; *United States v. Johnson*, 383 U.S. 169, 177-179), the Speech or Debate Clause was de-

rived from and parallels the English Bill of Rights of 1689 (1 Wm. & Mary, Sess. 2; c. 2), which itself "was the culmination of a long struggle for parliamentary supremacy" (*Johnson, supra*, 383 U.S. at 178; see Point I, *supra*). Here again, in determining the scope of the Clause, it is appropriate to consider that history and the British decisions interpreting the comparable immunity, which the Bill of Rights gave for "Freedom of Speech, and Debates or Proceedings in Parliament." That history and those cases indicate, as the court of appeals held, that the members' privilege of speech did not cover "privately published reproductions of their parliamentary speeches" (Pet. App. 26).

Commons' claim of the privilege of freedom of speech arose as a response to claims of the Crown that such speech violated royal prerogative (See Brief for the United States, *United States v. Johnson*, No. 25, October Term 1965, pp. 19-24). In this context Commons sought privacy of debate, not publicity. We have already noted the Commons' assertion of the right to exclude strangers (who might be spies for the King) from debates (*supra*, p. 17-18). In 1628 and again in 1640 the clerk was forbidden to make notes of speeches or to "suffer copies to go forth of any argument or speech whatsoever"; and in 1641 Commons ordered "That no Member shall either give a copy, or publish in print anything that he shall speak here, without leave of the House" (May, *Parliamentary Practice*, (16th ed., 1957) 55). Repeated orders of the House forbidding publication of debates have never been rescinded, although they have fallen into disuse,

and, since 1909, there has been an official report of debates (*ibid.*).

It is thus hardly surprising that the privilege of freedom of debate has never been thought by English courts to include republication. The first case dealing with republication was *Rex v. Williams*, 2 Show. K.B. 471, 89 Eng. Rep. 1048, decided in 1688. In that case the Speaker of the House of Commons was criminally prosecuted and fined 10,000 pounds for publishing a libel. His defense was that the publication was done in his official capacity and pursuant to order of the House. The court rejected this defense, ruling that an order of the House could not "justify the scandalous, infamous, flagitious libel."

In *Rex v. Lord Abingdon*, decided in 1795, 1 Esp. N.P. Cas. 228, a member of the House of Lords was criminally prosecuted for privately republishing a libelous speech he had delivered on the floor of the House. His defense was that he had a right to print and publish what he had a right to deliver; the court ruled that his privilege to deliver the speech did not extend to private republication for his personal purposes. The result in *Abingdon* was foreshadowed by the earlier decision in *Williams*, since if even official republication directed by the House was not privileged, *a fortiori* private personal republication was not protected.

Thus, at the time the Constitution was drafted, the law in England was that any parliamentary privilege covering speech and debate on the floor did not extend to republication.

Senator Gravel argues (Pet. No. 1077, 15), however, that the "underpinning" of these and other early decisions "has been repudiated" and "their holding has not survived," and that at least since *Wason v. Walter*, L.R. 14 Q.B. 73 (1868), "the settled law in England is that the Parliamentary privilege protects a member who publishes a speech 'for the information of his constituents,' and that the privilege applies derivatively to the publisher." Although certain republications of Parliamentary debate are now privileged, that was the result not of any judicial decision repudiating the earlier cases but of (1) a statute and (2) a recognition of a newspaper's privilege fairly and accurately to report parliamentary proceedings.

The statute was the Parliamentary Papers Act of 1840, 3 and 4 Vict. c. 9.²⁴ It was the reaction of Parliament to the decision three years before in *Stockdale v. Hansard*, 9 Ad. & E. 1, 112 Eng. Rep. 1112 (K.B.), which had unequivocally denied a privilege for republication. In that case a publisher sued the public printer for damages based on a defamatory statement contained in a committee report on English prisons that the House of Commons had ordered printed. In an historic opinion that has been described as the final decision rejecting the claim of Parliament to a broad privilege for republication,²⁵ the court permitted recovery. It stated:

²⁴ Under this statute, all criminal and civil proceedings against persons for publication of papers printed by order of a house of Parliament were stayed upon the filing of an affidavit reciting such order. See *Wittke, op. cit., supra*, 155.

²⁵ May, *Parliamentary Practice* (16th ed., 1957) 58.

For speeches made in Parliament * * * that member enjoys complete impunity * * *. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the Speaker, by authority of the House, order an illegal Act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles' warrant for levying ship-money could justify his revenue officer. [9 Ad. & E. at 114, 112 Eng. Rep. at 1156.]

In *Wason v. Walter*, L.R. 4 Q.B. 73. (1868), which Senator Gravel views as having "repudiated" the earlier decisions, the court held that an action for libel could not be grounded upon a newspaper's republication of a defamatory speech made on the floor. The ground of decision, however, was not that the Parliamentary privilege extended to republication, but that the republication was privileged by analogy to the rule protecting a newspaper's fair and accurate reporting of court proceedings. Indeed, the court in *Wason* pointed out that *Stockdale* had correctly rejected the claim that Parliamentary privilege covered republication. It stated (L.R. 4 Q.B. at 86-87):

From the doctrines involved in this defence, namely, that the House of Commons could by their order authorize the violation of private rights, and, by declaring the power thus exercised to be a matter of privilege, preclude a court of law from inquiring into the existence of the privilege,—doctrines which would have placed the rights and liberties of the subject

at the mercy of a single branch of the legislature,—Lord Denman and his colleagues, in a series of masterly judgments which will secure to the judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold.

To the decision of this Court in that memorable case we give our unhesitating and unqualified adhesion. But the decision in that case has no application to the present. The position, that an order of the House of Commons cannot render lawful that which is contrary to law, still less than a resolution of the House can supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House or protected by the assertion of its privilege, but whether it is, independently of such order or assertion of privilege, in itself privileged and lawful.

C. The American Authorities Indicate That the Clause Does Not Cover Republication.

The American authorities, though they are scant, are in accord with the British decisions that the legislative privilege for speech and debate does not extend to republication. Thomas Jefferson recognized that the Speech or Debate Clause applies only "to things done in the House in a Parliamentary course. * * * For [a Member] is not to have a privilege *contra morem parliamentarium*

to exceed the bounds and limits of his place and duty" (Jefferson, *Manual of Parliamentary Practice*, in S. Doc. No. 1, 90th Cong., 1st Sess., p. 388).

In his Commentaries on the Constitution, Justice Story noted that the Speech or Debate Clause was intended to provide the same privilege that Parliament had, and that

This privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place (a) and limits of duty. Therefore, although a speech delivered in the House of Commons is privileged, and the member cannot be questioned respecting it elsewhere, yet, if he publishes his speech, and it contains libelous matter, he is liable to an action and prosecution therefor * * * [Story, Commentaries, pp. 630-631].

McGovern v. Martz, 182 F. Supp. 343 (D.D.C.), involved claims for libel based, among other things, upon private printing and circulation of excerpts from the Congressional Record. The court held that although an absolute privilege covers material in the Record, there is only a qualified privilege for republication of the Record. It stated (p. 347):

But what of republication? Should an absolute privilege exist to bar suits for defamation resulting from a Congressman's circulation of reprints or copies of the Congressional Record to non-Congressmen? The reason for the rule—complete and uninhibited discussion among [legislators] is not here served. Accordingly, the absolute privilege to inform a fellow leg-

islator (either by way of speech on the floor or writings inserted in the Record) becomes a qualified privilege for the republication of the information.

See, also, *Long v. Ansell*, 69 F. 2d 386, 389 (C.A. D.C.), affirmed, 293 U.S. 76 (libel action based on printing and distributing copies of the Congressional Record containing reports of an allegedly libelous speech made on the floor of the Senate; "While the published articles were in part reproductions of the speech, the offense consists not in what was said in the Senate, but in the publication and circularizing of the libelous documents"); *Hentoff v. Ichord*, 318 F. Supp. 1175, 1180-1181 (D. D.C.) (the "further printing and public distribution [of a committee report] is not necessary to give effect to the freedom of Congressmen to speak and debate on and off the floor. The Speech or Debate Clause does not necessarily bar an action to enjoin the Public Printer from printing a committee report for public distribution").²⁶

D. Any Legislative Privilege That Congressional Aides Have Immunizes Them Only From Tort Liability and Perhaps Injunctive Relief, but not from Testifying Before a Grand Jury.

²⁶ *Methodist Foundation for Social Action v. Eastland*, 141 F. Supp. 731 (D. D.C.), upon which Senator Gravel relies (Pet. No. 1017, pp. 14, 16), involved an attempt to enjoin the printing as a Senate document of a subcommittee document whose printing the Senate had authorized. The court ruled (p. 731) that "nothing authorizes anyone to prevent Congress from publishing any statement"; it decided nothing on whether the Speech or Debate Clause covers republication.

The court of appeals ruled (Pet. App. 28) that, by analogy to the absolute immunity executive officers have for torts committed in the performance of their official duties (*Barr v. Matteo*, 360 U.S. 564), a member of Congress "may not be questioned at all as to republication," and that his aides enjoy a similar immunity.²⁷

The conclusion the court drew from the analogy is unsound. *Barr v. Matteo* dealt solely with the tort liability of government officers, and the policy reasons upon which that immunity rests do not justify extending it to grand jury testimony. To the contrary, such an extension of the doctrines of official or legislative immunity would be inconsistent with the well-recognized "duty" of "[e]very citizen," including members of Congress and their aides, "of giving testimony to aid in the enforcement of the law" (*Piemonte v. United States*, 367 U.S. 556, 559, n. 2). To our knowledge, the doctrine never has been applied to bar a grand jury from questioning government officers. Its sole office has been to confer immunity from tort or (perhaps) from injunctive liability.

Suppose, for example, that a grand jury had been investigating the terminal leave payments to which the libel in *Barr v. Matteo* related, to determine whether they constituted a crime. Although Mr. Barr,

²⁷ Although the court's ruling on legislative privilege in terms covered only Senator Gravel, the extension of such immunity by implication to his aide seems the only basis for the court's prohibition against questioning Dr. Rodberg about the republication of the Pentagon Papers, in view of the court's holding that the Speech or Debate Clause does not cover republication.

the Acting Director of the government agency involved, was not civilly liable for the libelous press release he issued, he surely could not refuse to testify before the grand jury about the incident. The reason lies in the purpose of the immunity from tort liability recognized in *Barr*.

The immunity involved in *Barr v. Matteo*—and in the many similar decisions that preceded and have followed it—provides “a defense by officers of government to civil damage suits for defamation and kindred torts” (360 U.S. at 569; *id.*, p. 565). Its rationale is that it is “important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government” (p. 571). See, also, *Gregoire v. Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949.

There is no comparable policy justification for giving Congressional aides immunity from testifying before a grand jury. It is neither necessary nor desirable in order to encourage them to perform their duties properly. The possibility of being summoned by a grand jury, unlike the threat of personal tort liability, is unlikely to deter a legislative aide from performing his tasks vigorously and unhesitatingly. Nor is it likely that legislative aides would be called before grand juries with such frequency that it would im-

pose unjustified demands upon their time; the situation would be different, however, if damage suits were permitted against government officers for alleged torts committed as part of their duties. Finally, the public interest in obtaining grand jury testimony of all persons who have knowledge of matters that the grand jury is investigating, whatever their official position, which supports the claim here, is weightier than the private interest of persons seeking financial redress for torts that government officers allegedly committed against them.

Although this Court has long recognized the immunity of members of the judicial and executive branches of the government from tort liability for official acts (*Bradley v. Fischer*, *supra*, 13 Wall. 335 (judge); *Spalding v. Vilas*, 161 U.S. 483 (Postmaster General)); we know of no case in which the immunity has been extended to excuse them from testifying before a grand jury. There is no reason why a different rule should be created for employees of the legislative branches, for whom this Court only recently suggested there may be a similar immunity from tort and injunctive liability (see *Wheeldin v. Wheeler*, *supra*, 373 U.S. 647; *Dombrowski v. Eastland*, *supra*, 387 U.S. 82).

In sum, there is no sound reason to create an immunity apart from the Speech or Debate Clause that would permit employees of the legislative branch to avoid the normal duty of all citizens to testify before the grand jury about any matter of which they have knowledge.

E. Any Possible Privilege That Legislative Aides Might Have not to Give Grand Jury Testimony About Republication of Protected Speech or Debate Does not Extend to Third Persons who Participate in Such Republication.

Even if, contrary to our submission, either the Speech or Debate Clause or a legislative immunity permits legislative aides to avoid testifying before a grand jury about republication of protected speech or debate, the immunity does not extend to third persons whose only possible connection with the legislative process is that they were negotiating for or handling the republication.

The language of the Clause, no matter how broadly it is construed, cannot fairly be read to cover such third persons. Those persons are not performing essential aspects of the legislative process on behalf of "Senators or Representatives," so that making the immunity of the latter effective requires that it be extended to the former. Neither Mr. Webber, the editor of the Massachusetts Institute of Technology Press with whom Senator Gravel or Dr. Rodberg had unsuccessful negotiations, nor officials of the Beacon Press, which ultimately handled the republication, were performing or effectuating the performance of any legislative function in their negotiations for the republication. Rather they were merely carrying on the private business of their own publishing organizations. Their activities were neither Congressional "Speech or Debate," nor a part of the legislative process.

Nor can it be said that Senator Gravel is "being questioned" when third persons are questioned about their dealings with him or his aide. The questioning that the Clause prohibits is questioning of the Senator or Representative, not questioning of other persons about their dealings with him.

The extension of immunity to such third persons is not necessary to make the Speech or Debate Clause privilege effective. It is far fetched to suggest that a member of Congress is likely to be deterred from doing his job properly because of the possibility that some third person with whom he has contact may be questioned by a grand jury about the matter.

If, as the court of appeals held in the *Johnson* case, 337 F. 2d 180 (C.A. 4), third persons may be criminally prosecuted for their dealing with a Congressman involving the performance of his legislative function, *a fortiori* they may be required to testify before a grand jury about such dealings.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it permits inquiry of Dr. Rodberg, and of private persons who have dealt with Senator Gravel or his aides. The judgment should be reversed

insofar as it restricts the questions that may be asked of Dr. Rodberg and other witnesses.

Respectfully submitted.

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APRIL 1972.

APPENDIX

United States District Court for the
District of Columbia

Civil Action No. 1254-71

JOHN E. MOSS, OGDEN R. REID, PLAINTIFFS

v.

MELVIN R. LAIRD, SECRETARY, DEPARTMENT OF
DEFENSE, DEFENDANT

Civil Action No. 1865-71

PAUL FISHER, DIRECTOR, FREEDOM OF
INFORMATION CENTER, PLAINTIFF

v.

DEPARTMENT OF DEFENSE; MELVIN R. LAIRD,
SECRETARY, DEPARTMENT OF DEFENSE, DEFENDANTS

AFFIDAVIT OF J. FRED BUZHARDT, GENERAL COUNSEL,
DEPARTMENT OF DEFENSE

STATE OF VIRGINIA, County of Arlington, ss.:

J. Fred Buzhardt, being duly sworn, deposes and
says:

1. I am the General Counsel of the Department of
Defense and have personal knowledge of the matters
related herein. The Secretary of Defense delegated
to me full responsibility for determining whether
portions of the 47 volumes entitled "United States-
Vietnam Relations, 1945-1967" hereafter referred to
as "the Study," could be declassified without damage
to the national defense or foreign policy. It is pur-

suant to this authority that I have reviewed the Study and have made the determination that materials deleted in the Government's declassified version of the Study remain classified in the interest of the national defense/or foreign policy.

2. Numerous Top Secret-Sensitive documents from the Department of Defense, the State Department, and United States intelligence agencies were utilized in preparation of the Study. After significant portions of the material in the 47-volume Study were published without authorization, Secretary of Defense, Melvin R. Laird, directed that a security review be made of the entire 47-volume Study to determine how much of it could be made available for public dissemination, consistent with the interest of national security and the conduct of foreign affairs.

3. Independent of this directive, the Secretary, by letters to the Speaker of the House of Representatives and to the President of the Senate, dated June 28, 1971, forwarded copies of the complete Study for the use of those Congressmen and Senators who desired to have access to this information. Mr. Laird's letter (a copy attached) stated that the Study remains classified Top Secret-Sensitive and "... is delivered in accordance with our understandings as to the special security measures to be taken by you to protect those materials in the volumes, the disclosure of which could have a grave and immediate danger to the national security." (Copy of Check List attached.)

4. By letter, dated September 20, 1971, to the Honorable F. Edward Hébert, Chairman, Armed Services Committee, House of Representatives, Mr. Rady A. Johnson, Assistant to the Secretary of Defense, transmitted to Mr. Hébert a declassified version of the Study (copy attached). I hereby confirm all of the statements contained in said letter and incorporated

by reference as though fully set forth herein all relevant matters therein contained.

5. In the 43-volume set which was made available to the public through the Government Printing Office on September 20, 1971, certain pages, paragraphs, and footnotes have been deleted. The aforementioned pages and paragraphs were deleted in accordance with the standards and criteria of Executive Order 10501. Approximately two percent of the total narrative material contained in the 43 volumes have been deleted. The deletions, made after an extensive review, fall within four areas of sensitivity:

(1) Information concerning the United States military plans, principally those of the Joint Chiefs of Staff, the Pacific Command, and the Military Assistance Command, Vietnam, as well as other U.S. planning, the public disclosure of which could cause serious damage to the defense interests of the United States. Disclosure of the plans gives exact knowledge to military planners of hostile countries as to what the U.S. will or will not do in response to actions taken against either the U.S. or countries friendly to it, such as Thailand.

(2) Information concerning joint planning of defense arrangements by the U.S. with other countries, principally SEATO members, and bilateral defense arrangements between these countries not involving the U.S., the public disclosure of which could do serious damage to the defense interests of United States allies. Basic concepts outlined, for example, in the 1961 SEATO Contingency Plans are still valid in the current updated versions of these plans.

(3) Information concerning United States diplomatic negotiations with high-level officials of other countries, notably South Vietnam and Laos, the public disclosure of which could do serious damage by

jeopardizing the international relations of the United States. Publicly revealing secret U.S. assessments of Southeast Asian government leaders—outlining their attitudes to the USSR, SEATO, and the U.S. and reflecting, in turn, the degree of U.S. trust in them—could make impossible or seriously handicap, for example, continued U.S. negotiations with these leaders.

(4) Information derived from United States intelligence, or descriptive of United States intelligence activities, the public disclosure of which could do serious damage to the defense interests of the United States. Upon learning of successful U.S. intelligence operations and discovering thereby the sophistication level (for example, in electronic applications) the U.S. has reached in collecting intelligence, hostile countries could undertake measures to prevent U.S. intelligence collection.

6. Since the publication by the Government Printing Office of the 43 volumes, I have reviewed again, the deleted pages and paragraphs, and have concluded that it remain in the interest of the national defense and the conduct of foreign policy that these deletions should not appear in publications available to the public at this time.

7. I have also reviewed again the four volumes which have not been made public and which deal exclusively with sensitive negotiations involving North Vietnam and employing the good offices of other governments in seeking peace and the release of prisoners of war. I have concluded that consistent with the interests of the national defense and the conduct of foreign policy of the United States that these last four volumes should not be made public. Much of the material contained in the four volumes could, if disclosed, result in serious damage to the Nation by jeopardizing the international relations of the United

States. Other documents in the four volumes, if made publicly available, would cause the compromise of intelligence operations vital to the national defense and thereby cause exceptionally grave damage to the Nation.

8. In order to avoid delay in the declassification of the 43 volumes published by the Government Printing Office, all footnotes were deleted. Many of these footnotes referred to highly classified documents not published as such in the 43 volumes. To determine the significance of each of the footnotes would have entailed a careful and time-consuming analysis. The footnotes themselves are now being reviewed to determine which of them may be released for publication and which must be withheld in the interest of national security or foreign policy considerations. Upon completion of this work, the Department of Defense will make available to the public the footnotes in the 43 volumes which do not require protection in the national interest.

9. It is my considered judgment based upon my personal examination that it would be prejudicial to the national defense and foreign policy interest of the United States to make public, at this time, any material from the Study not contained in the Government Printing Office publication. The Secretary and Deputy Secretary of Defense affirm my conclusions in this respect.

10. Publication of the declassified version of the Study by the Government Printing Office has made available to the plaintiffs and the public all of the material in that Study which should properly be made public at this time, in accordance with the intention of the Congress in enacting the Freedom of Information Act. Those portions withheld from the public are expressly excluded from publication and disclosure by the provisions of section 552(b)(1) of title 5 USC,

which exempts from disclosure those matters "specifically required by Executive order to be kept Secret in the interest of the national defense or foreign policy."

J. FRED BUZHARDT.

STATE OF VIRGINIA,
County of Arlington, ss.

Subscribed and sworn to before me, a Notary Public for the County of Arlington, State of Virginia, this 26th day of November, 1971.

[illegible]
Notary Public.

My commission expires July 31, 1973.

THE SECRETARY OF DEFENSE,
Washington, D.C., June 28, 1971.

HON. CARL ALBERT,
Speaker, House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Pursuant to the decision by the President and our subsequent discussion and arrangements, I am having delivered herewith the 47-volume study entitled: "United States Vietnam Relations; 1945-1967."

The study remains classified TOP SECRET-SENSITIVE and is delivered in accordance with our understandings as to the special security measures which will be taken by you to protect those materials in the volumes, the disclosure of which could have a grave and immediate danger to the national security.

As you are aware, an intensive review of the study is now in process for the purpose of declassifying as much of the material as possible consistent with the interest of national security and in consideration of the widespread unauthorized disclosures by the news-

papers in recent days. Every effort is being made to expedite this review and we anticipate that a large portion of the documents will be declassified pursuant to these guidelines.

I have been informed by my security people that they have provided you with the assistance and information you needed to ensure that only members of your body will be permitted access to the documents and that they are controlled and protected as required by law or regulation.

A copy of the study is being delivered simultaneously to the President Pro Tempore of the Senate.

Sincerely,

MELVIN R. LAIRD.

THE SECRETARY OF DEFENSE,
Washington, D.C., June 28, 1971.

Hon. ALLEN J. ELLENDER,
President Pro Tempore,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ELLENDER: Pursuant to the decision by the President and our subsequent discussion and arrangements, I am having delivered herewith the 47-volume study entitled: "United States Vietnam Relations, 1945-1967."

The study remains classified TOP SECRET-SENSITIVE and is delivered in accordance with our understandings as to the special security measures which will be taken by you to protect those materials in the volumes, the disclosure of which could have a grave and immediate danger to the national security.

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I have been informed by my security people that they have provided you with the assistance and information you needed to ensure that only members of your body will be permitted access to the documents and that they are controlled and protected as required by law or regulation.

A copy of the study is being delivered simultaneously to the Speaker of the House.

Sincerely,

MELVIN R. LAIRD.

CHECKLIST

Only Members of the Congress will have access to the Study.

The Study will be controlled by and in the custody of the House Armed Services Committee for the House of Representatives. Classified storage containers, access list forms, Top Secret Information cover sheets and document control forms will be furnished by the Department of Defense for this purpose.

A complete document inventory will be conducted at the close of business each day.

The Study may not be taken from the reading room designated by the House Armed Services Committee. A Committee representative or a Capitol police officer will be present when the Study is not physically locked in the classified storage container.

Access lists will be maintained showing the time of arrival and departure of all persons entering and leaving the reading room, including Capitol police.

The Congressional Members reading the Study will annotate the Top Secret Information cover sheet attached to each document indicating name, date, and the portions of the document read.

The Study contains information respecting the national defense within the meaning of Title 18, United States Code, and the Internal Security Act of 1950, as amended. No notes, reproductions, or recordings will be made of any portions of the Study, nor will its contents be divulged in any way to unauthorized persons.

